VI. OPINION OF THE COURT BY JONES, CHIEF JUDGE.

IN THE UNITED STATES COURT OF CLAIMS
No. 182-55

(Decided November 7, 1956)

GEORGE EDWARD LEONARD v. THE UNITED STATES

Mr. Richard T. Brewster for the plaintiff.

Mrs. Sondra K. Slade, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for the defendant.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

JONES, *Chief Judge,* delivered the opinion of the court:

On August 17, 1942, plaintiff was given a temporary commission as a first lieutenant in the Army of the United States, for the duration of the war and six months thereafter, unless sooner terminated.

In April 1943 plaintiff was found by an Army Retiring Board to be physically incapacitated for active service, that his disability was not service connected, and he was accordingly on May 3, 1943, issued an honorable discharge (effective on that date) for physical disqualification.

On March 8, 1945, an Army Retiring Board set aside the previous findings, including the finding that plaintiff's incapacity was not the result of an incident of the service, and on March 10, 1945, the Secretary of War approved the findings of March 9, [sic] 1945, of the Retiring Board and directed that plaintiff be certified to the Veterans Admin-

istration as entitled to retirement pay under the act of April 3, 1939 (53 Stat. 555, 557).

Since his discharge plaintiff has held various positions as a civilian employee of the Government. During these periods of employment plaintiff's retirement pay has been withheld under section 212 (a) of the Economy Act of 1932, (47 Stat. 406), which forbids, *inter alia*, a civilian employee from drawing retired pay on account of service as a commissioned officer in excess of the amount necessary to make that amount plus his salary as civilian equal to $3,000 per annum.

Concededly plaintiff is subject to this limitation unless it has been repealed or unless he is exempt from its provisions.

That it has not been repealed is evident from the fact that section 212 was on August 4, 1955, amended by section 2 of Public Law 239, 84th Congress, 1st session, 69 Stat. 498, simply by raising the limitation to a higher amount, thus recognizing that the limitation was still in effect. The terms of that amendment are not applicable here.

The only other basis of recovery is plaintiff's claim that his status is that of a retired member of the Officers' Reserve Corps and that he is therefore entitled to the provisions of the act of July 1, 1947, 61 Stat. 238, 239 (10 U. S. C. 371 (b)),

> * * * No existing law shall be construed to prevent any member of the Officers' Reserve Corps or the Enlisted Reserve Corps from accepting employment in any civil branch of the public service nor from receiving the pay incident to such employment in addition to any pay and allowances to which he may be entitled under the laws relating to the Officers' Reserve Corps and Enlisted Reserve Corps, nor as pro-

hibiting him from practicing his civilian profession or occupation before or in connection with any department of the Federal Government.

Plaintiff cites as authority this court's decision in *Tanner* v. *United States*, 129 C. Cls. 792. This officers' reserve corps named in the above-quoted statute and cited in the *Tanner* case, was the Officers' Reserve Corps of the Army.

Plaintiff alleges that since he was discharged from the Army Air Force because of an incapacity which a retiring board first found was non-service connected and which finding was later reversed and vacated and plaintiff certified to the Veterans Administration for retirement pay, he automatically becomes a member of the reserve component and therefore entitled to the exemption stipulated in section 371 (b) *supra*.

We do not think this particular provision of the statute applies to him nor that he can be regarded as a member of any reserve component.

The statute, section 371 (b), *supra*, serves to exempt longevity retired members of reserve components from the dual compensation restriction of section 212 (a) of the Economy Act of 1932.

Because of his absolute discharge from the armed services by reason of physical disability plaintiff is not a member of the Officers' Reserve Corps.

Plaintiff asserts that he is of the belief that he is at present and has been at all times since his discharge from the armed services on May 3, 1943, a member of a reserve component since his name is carried on the AFUS retirement list. In the first place, the retirement list contained in that register "consists of those Air Force officers of other than the Regular Air Force who are granted retired pay

under provision of law." (Air Force Register, January 1, 1956, p. 603.) This register, established pursuant to section 301 (a) of Title III of the act of June 29, 1948 (62 Stat. 1087), contains a list of those who hold or have held commissions and who are drawing retired pay.

Plaintiff was discharged on May 3, 1943. He was not retired nor released to inactive duty, but discharged from his commission as lieutenant and fully released from the armed services. He was no longer subject to any form of military discipline and could not be called back to serve as an officer without first being appointed by the President.

The subsequent reversal of the Retiring Board's action holding that plaintiff had a non-service connected disability and the holding that it was service-connected, did not confer upon plaintiff any status as an officer. He remained a civilian and was simply entitled to the retired pay of an officer who was discharged because of physical disability, service-connected. *McBlair* v. *United States*, 19 C. Cls. 528. He was granted retirement pay in accordance with the act of April 3, 1939, *supra*, as of the date of his discharge. Since May 3, 1943, he has had no connection with the armed services other than his right to compensation for a disability he incurred while serving on military duty.

It is manifest, therefore, that plaintiff, unlike Tanner, has not since his discharge been a member of a reserve component.

The record is such as to make the essential facts indisputable, and it would be a waste of time and an added expense to both plaintiff and defendant to refer the case to a trial commissioner for hearing.

The defendant's motion for summary judgment is granted and the petition is dismissed.

LARAMORE, *Judge*; MADDEN, *Judge*; and WHITAKER, *Judge*, concur.

LITTLETON, *Judge*, dissents.

VII. PROCEEDINGS FOLLOWING OPINION OF THE COURT.

On December 6, 1956, plaintiff filed a motion for rehearing.

On January 16, 1957, the court entered the following order on said motion:

* * * * * * * * *

182-55 GEORGE E. LEONARD

* * * * * * * * *

ORDER

These cases come before the court on plaintiffs' motions for rehearings, amendment of judgments or new trials under Rule 53 of the Rules of this Court and, on consideration thereof,

IT IS ORDERED this sixteenth day of January 1957, that said motions be and the same are denied.

BY THE COURT

/s/ Marvin Jones

MARVIN JONES

Chief Judge.

SETTLEMENT CERTIFICATE.

UNITED STATES
GENERAL ACCOUNTING OFFICE
WASHINGTON 25, D. C.

In correspondence
please refer to:

Division: Claims
Claim No.: Z-1281737

FEB. 10 1955
(Date)

George Edward Leonard, Jr., 1st Lt., AUS, Retired,
1100 Columbia Bank Building,
921 Walnut Street,
Kansas City 6, Missouri.

Sir:

Your claim for retired pay as first lieutenant, Army of the United States, service No. 0-914 948, believed to have been erroneously withheld while employed as a civilian by the United States Government for intermittent periods from June 12, 1943 to June 12, 1953, has been carefully examined and it is found that no part thereof may be allowed for the reasons hereinafter stated.

The records show that you were retired April 19, 1943, as a first lieutenant, by reason of physical disability, under the provisions of the Act of April 3, 1939, 53 Stat. 557; and you state that you were employed as a civilian by the United States Government from June 12, 1943 to May 1, 1944; August 21, 1944 to January 12, 1947; October 20, 1947 to January 12, 1952; and September 5, 1952 to June 12, 1953.

Section 212 of the Act of June 30, 1932, 47 Stat. 406, provides that after June 30, 1932, no person holding a civilian office or position, appointed or elective, under

the United States Government, shall be entitled during the period of such incumbency, to retired pay from the United States for or on account of such services, as a commissioned officer of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health, at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than $3,000.00, except in cases of regular or emergency commissioned officers retired for disability incurred in combat with an enemy of the United States.

While you have not so stated, it appears that your claim is based on a recent decision of the United States Court of Claims, in the case of Tanner v. United States, No. 543-53, decided November 2, 1954, which held that Army Reserve officers (retired under the provisions of Title III, Public Law 810, approved June 29, 1948, 62 Stat. 1087), who are entitled to retired pay can receive such pay even though holding a position as a civilian employee with the United States Government with compensation in excess of $3,000.00 or more per annum. However, that matter is still in litigation, and since it applied to officers retired under the provisions of Title III, Public Law 810, supra, it would have no application to your case since you were retired under the Act of April 3, 1939, 53 Stat. 577.

I therefore certify that no balance is found due you from the United States.

Respectfully,

Comptroller General
of the United States
By: Carl E. Hylman

COMPTROLLER GENERAL'S LETTER.

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON 25

B-128161 AUG. 10, 1956

First Lieutenant Howard J. Hess, AUS, Retired
1621 North Franklin Place
Milwaukee 2, Wisconsin

Dear Lieutenant Hess:

Reference is made to your letter of May 27, 1956, further concerning your claim for retired pay as first lieutenant, Army of the United States, from August 6, 1945, to August 3, 1955, based on the opinion in the case of Tanner v. United States, 129 C. Cls. 792.

You refer to our settlement dated May 17, 1956, and say that inasmuch as the United States Supreme Court stated in effect that retired reserve officers who are employees of the Government are not bound by any dual compensation restrictions, you are greatly disappointed on the disallowance of your claim. You inquire as to any further action which may be taken by you.

In its opinion of November 2, 1954, in the case of Tanner v. United States, 129 C. Cls. 792, the Court of Claims concluded that the plaintiff, who was held or assumed to be a member of the Officers' Reserve Corps, was entitled to concurrent payments of retired pay under Title III of the act of June 29, 1948, 62 Stat. 1087, and Federal civilian compensation, without regard to the dual compensation restrictions of section 212(a) of the Economy Act of June 30, 1932, 5 U. S. C. 59a, because of the provisions of section 1(b) of the act of July 1, 194., 61 Stat. 239, which, as amended by section 804 of the act of

July 9, 1952, 66 Stat. 506, effective January 1, 1953, permit a member of a reserve component to be employed in any civil branch of the public service and to receive the pay incident to such employment "in addition to any pay and allowances to which he may entitled under the laws relating to the reserve components of the Armed Forces." The defendant's petition for a writ of certiorari in that case was denied by the Supreme Court of the United States on October 10, 1955.

We accept and follow the court's opinion in the Tanner case as a precedent for retroactive and prospective payment of military retired pay (in addition to civilian compensation) in those cases where the claimant, being otherwise entitled, has been, or may be, granted retired pay under Title III of the act of June 29, 1948, and has been a de jure member of a reserve component of the Armed Forces during the period covered by the payment, provided that for any period prior to January 1, 1953, payment will be approved only if the claimant was a de jure member of the Officers' Reserve Corps or the National Guard during the period involved, since members of other reserve components were not brought within the provisions of the 1947 act until that date. 35 Comp. Gen. 497.

It appears that you were granted retirement pay for physical disability, effective from August 6, 1945, as a first lieutenant, Army of the United States, under the provisions of the act of April 3, 1939, 53 Stat. 557, but that your disability was not incurred in combat with an enemy of the United States and did not result from an instrumentality of war. Thus your case was not one which, under the provisions of section 212(b) of the Economy Act of June 30, 1932, was exempted from the restrictions of

section 212(a) of that act. Since you were not at the time of your retirement and never had been a member of any Officers' Reserve component, the holding in the Tanner case is not for application in your case.

The precise question involved in your case appears to be now before the Court of Claims in the pending case of Leonard v. United States, C. Cls. No. 182-55. You may, if you wish, bring a similar suit in the Court of Claims or you may await the outcome of the Leonard case before taking such action, bearing in mind that the period of limitation for filing suits in the Court of Claims is six years (28 U. S. C. 2501). We anticipate taking no action on claims of this type, however, until the Leonard case, or a similar case, has been finally decided, and, if decided against the Government, until a determination is made here as to the extent such decision will be followed in settling claims and adjusting accounts.

Very truly yours,

JOSEPH CAMPBELL
Comptroller General
of the United States

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 908

GEORGE EDWARD LEONARD, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition For a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. A1-A5) is reported at 145 F. Supp. 758.

JURISDICTION

The judgment of the Court of Claims was entered on November 7, 1956. Petitioner's timely motion for a rehearing was denied on January 16, 1957. The petition for a writ of certiorari was filed on April 15, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims correctly held that petitioner did not come within the class of officers specifically exempted, under that court's decision in *Tanner* v. *United States*,[1] from the dual compensation restrictions of the Economy Act of 1932.

STATUTES INVOLVED

At all times here material, Section 212 of the Economy Act of 1932, 47 Stat. 406, 5 U.S.C. 59a(a), provided, in pertinent part:

> (a) After June 30, 1932, no person holding a civilian office or position, appointive or elective, under the United States Government * * * shall be entitled, during the period of such incumbency, to retired pay from the United States for or on account of services as a commissioned officer in the Army of the United States, * * * at a rate in excess of an amount which when combined with the annual rate of compensation from such civilian office or position, makes the total rate from both sources more than $3,000; and when the retired pay amounts to or exceeds the rate of $3,000 per annum such person shall be entitled to the pay of the civilian office or position or the retired pay, whichever he may elect. * * *.

Section 1b of the Act of July 1, 1947, 61 Stat. 238, 10 U.S.C. (1946 Ed. Supp. I) 371b, provided, in pertinent part:

> No existing law shall be construed to prevent any member of the Officers' Reserve Corps or the Enlisted Reserve Corps from accepting employment in any civil branch of the public service nor

[1] 129 C. Cls. 792, certiorari denied, 350 U.S. 842.

from receiving the pay incident to such employment in addition to any pay and allowances to which he may be entitled under the laws relating to the Officers' Reserve Corps and Enlisted Reserve Corps, * * *.

STATEMENT

On August 17, 1942, petitioner accepted a temporary appointment as a 1st Lieutenant, Air Corps, Army of the United States,[2] and served on active duty until April 18, 1943 (Complaint, par. 2). On May 3, 1943, petitioner was honorably discharged for reasons of disability (Complaint, par. 2). At the time of his discharge, petitioner was found not entitled to disability retired pay on the ground that his disability was not an incident of service (Complaint, par. 2). The finding as to the source of petitioner's disability was changed by an Army Retiring Board in 1945 and petitioner was, accordingly, certified as entitled to retired pay under the Act of April 3, 1939, 53 Stat. 555, 557 (Complaint, par. 2).

Petitioner, after his discharge in 1943, was intermittently employed by the United States in various civilian capacities during the period 1943 to 1953 (Complaint, pars. 3-11). During these periods of intermittent employment by the United States, petitioner's military retired pay was withheld under the provisions of Section 212 of the Economy Act of 1932, 47 Stat. 406, 5 U.S.C. 59a(a) which prohibited receipt

[2] Petitioner's commission was conferred by authority of H. J. Res. 199, September 22, 1941 (55 Stat. 728) which authorized the temporary appointment of commissioned officers by the President, all appointments so made to continue "during the present emergency [the then-approaching World War II] and six months thereafter" unless sooner terminated.

of retired pay for or on account of service as a commissioned officer by a Federal civilian employee where his civilian pay and military retired pay would exceed $3,000 per annum.

For the pay thus withheld, petitioner, on May 2, 1955, brought suit in the court below. The basis of the claim was that the Veterans' Preference Act of 1944[3] repealed Section 212 of the Economy Act of 1932 and that, additionally, the latter statute was unconstitutional (Complaint, pars. 15, 17-21). Neither of these contentions was substantial[4] and the Government, moving for summary judgment, treated the complaint as raising the question whether petitioner's claim was within the exemption to Section 212 of the Economy Act created by the Act of July 1, 1947, and recognized by the *Tanner* decision. The Court of Claims sustained the Government's position that petitioner was not within the exempted class and dismissed the complaint.

ARGUMENT

Section 212 of the Economy Act, *supra*, p. 2, prohibits the receipt of " * * * retired pay * * * for or on account of services as a commissioned officer * * * " by a Federal civilian employee if the retired pay combined with civilian salary exceeds the statu-

[3] 58 Stat. 387, 5 U.S.C. 851, *et seq.*

[4] Neither here, where the contention is reiterated (Pet. 13), nor in the court below, has petitioner supported his general assertion that the Veterans Preference Act of 1944 repealed Section 212 of the 1932 Act. Nor could he. There is nothing in the Veterans Preference Act which purports to work such a repeal. The opposite Congressional understanding is shown by the reenactment of Section 212, in 1955, for the purpose of raising the $3,000 limitation to $10,000. 69 Stat. 498. Petitioner's additional claim, that Section 212 as applied to him is unconstitutional, has long since been put at rest. *Lynch* v. *United States*, 292 U.S. 571, 577.

tory limit. In *Tanner* v. *United States,* 129 C. Cls. 792,[5] the Court of Claims held that the Act of July 1, 1947, *supra,* p. 2, created an exception to this dual compensation restriction for " * * * member[s] of the Officers' Reserve Corps * * *." The single issue in this case is whether petitioner comes within the excepted class.[6]

The Court of Claims correctly resolved this issue against petitioner. Recognizing that the only possible basis of recovery was membership in a reserve component for the periods in suit, the court below held that, after his discharge on May 3, 1943, petitioner had no further connection with the military (Pet. App. A3-A4). See also *McBlair* v. *United States,* 19 C. Cls. 528, 539.

Petitioner does not appear to challenge the ruling below as to the scope of the *Tanner* decision. Rather, he urges that there was a triable issue of fact which was incorrectly resolved by the court on motion for summary judgment. There is no merit to this narrow contention. The question whether petitioner ceased to be a member of the military in 1943 can be resolved only by examination of the documents pertaining to his military career. Duly certified copies of the pertinent documents, including petitioner's

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[5] This Court denied the Government's petition for certiorari. 350 U.S. 842.

[6] There is no substance to petitioner's suggestion that the decision below discriminates between those officers entitled to disability retired pay and those entitled to longevity retired pay (Pet. 14). Officers entitled to either type of retired pay fall within the scope of the *Tanner* decision if members of a reserve component for the period in question. See, *e.g., Joseph L. Madden* v. *United States,* C. Cls. No. 454-55, in which the Government has consented to the entry of a judgment in favor of a disability-retired reserve officer.

commission and his honorable discharge orders, were before the court on the Government's motion. The court below found the operative facts to be indisputable (Pet. App. A4).

CONCLUSION

The decision of the Court of Claims is correct. No important question or conflict of decisions is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
SONDRA K. SLADE,
Attorneys.

MAY 1957

★ U. S. GOVERNMENT PRINTING OFFICE 1957—425028/P.O. 1208